SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 78

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Docket No. 43615.

TITLE GUARANTEE LOAN & TRUST CO., AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances.

For Petitioner: Oscar W. Underwood, Jr., Esq., H. C. Kilpatrick, Esq.

For Respondent: Prew Savoy, Esq.

DOCKET ENTRIES.

1929.

Apr. 11 Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 12 Copy of petition served on General Counsel.

May 23 Answer filed by General Counsel.

May 25 Copy of answer served on taxpayer. General Calendar.

1931.

Nov. 14 Hearing set Jan. 20, 1932.

Dec. 17 Stipulation of facts filed.

1932.

Jan. 12 Motion to consolidate with docket 51185 filed by General Counsel. 1/13/32 granted.

Jan. 20 Hearing had before Mr. Trammell, Div. 2, called on the merits. Petitioner's proposed findings of fact filed. Brief due in 2 weeks.

Feb. 12—Memorandum opinion rendered Mr. Trammell. Division 2. Judgment will be entered for the Commissioner.
Feb. 13—Decision entered—Mr. Trammell, Division 2.
Mar. 1—Petition for review to U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.
Mar. 1—Proof of service filed.
Mar. 10—Praecipe filed.
Mar. 10—Proof of service of praecipe filed.
Mar. 10—Stipulation to prepare a joint transcript of record filed.
Mar. 12—Transcript of hearing Jan. 20, 1932, filed.

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2 Docket No. 51185.

Title Guarantee Loan & Trust Co., as Trustee of the Estate of J. H. Woodward, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Appearances.

For Petitioner: Oscar W. Underwood, Jr., Esq., H. C. Kilpatrick, Esq.

For Respondent: Prew Savoy, Esq.

DOCKET ENTRIES.

1930.
Dec. 8—Petition received and filed. Taxpayer notified. (Fee paid.)
Dec. 8—Copy of petition served on General Counsel.

1931.
Jan. 26—Answer filed by General Counsel.
Jan. 28—Copy of answer served on taxpayer—General Calendar.

1932.

Jan. 12—Motion to consolidate with 43615 set 1/-20/32 filed by General Counsel. 1/13/32 granted.

Jan. 12—Stipulation of facts filed.

Jan. 20—Hearing had before Mr. Trammell, Division 2, on merits. Petitioner's proposed findings of fact filed. Briefs due in two weeks.

Feb. 12—Memorandum opinion rendered—Mr. Trammell, Division 2. Judgment will be entered for the Commissioner.

Feb. 13—Decision entered—Mr. Trammell, Division 2.

Mar. 1—Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.

Mar. 1—Proof of service filed.

Mar. 10—Praecipe filed.

Mar. 10—Proof of service filed.

Mar. 10—Stipulation to consolidate record with docket 43615 filed.

Mar. 12—Transcript of hearing Jan. 20, 1932, filed.

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3 PETITION.

Filed Apr. 11, 1929.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs. Docket No. 43615.
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

Commissioner of Internal Revenue in his notice of deficiency, IT:AR:B-4-JHC-60D, dated February 26, 1919, and as a basis of his proceeding alleges as follows:

(1) The petitioner is a corporation, with principal office at the Title Guarantee Building, Birmingham, Alabama, and is trustee under the will of J. H. Woodward, as hereinafter set forth.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner by registered mail on February 26, 1929, and was received by the petitioner in due course of mail.

(3) The taxes in controversy are income taxes for the calendar years 1924, 1925, 1926 and 1927, and for $44,344.11.

4 (4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in determining that any deficiency is due for any of the years 1924, 1925, 1926 and 1927.

(b) Under the applicable provisions of Section 219 of the Revenue Acts of 1924 and 1926, the respondent erred in determining that the petitioner is liable for any tax for the years 1924, 1925, 1926 and 1927.

(c) The respondent erred in not allowing, under the provisions of Section 219 (b) and Section 219 (b) (2) of the Revenue Acts of 1924 and 1926, as additional deductions in computing the net income of the estate or trust of Joseph H. Woodward for the calendar

years 1924, 1925, 1926 and 1927, respectively, the following amounts, distributed currently to Martha B. Woodward by the petitioner as fiduciary to her as beneficiary of the said estate or trust, to-wit:

1924	$119,891.11
1925	70,467.01
1926	73,403.43
1927	73,030.94

(d) The respondent erred in not allowing as additional deductions in computing the net income of the estate or trust of J. H. Woodward, pursuant to Section 219 (b) and 219 (b) (2) of the Revenue Acts of 1924 and 1926, for the calendar years 1924, 1925, 1926 and 1927, respectively, all sums distributed by the petitioner as fiduciary to Martha B. Woodward as beneficiary under the trust created by the will of J. H. Woodward, and, as a result of not allowing such additional deductions, erred in determining adjusted net incomes of the petitioner as trustee of said estate or trust for said calendar years, respectively, as follows, to-wit:

1924	$119,891.11
1925	70,467.01
1926	73,403.43
1927	78,022.94

(e) The respondent erred in not determining, under Section 219 (b) and Section 219 (b) (2) of the Revenue Acts of 1924 and 1926 that there was no taxable net income for any of the years 1924, 1925, 1926 and 1927.

(5) The facts upon which the petition relies as the basis of this proceeding are as follows:

(a) Martha B. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, was

the wife of Joseph H. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, who died on December 15, 1917. The said Martha B. Woodward died on May 13, 1928.

(b) Joseph H. Woodward died on December 15, 1917, seized and possessed of real and personal property having a gross value at the time of his death of $4,883,622.86, and a value as a net estate of $4,641,-577.16, according to the final determination of D. H. Blair, Commissioner of Internal Revenue, by decision dated December 14, 1922, contained in a letter dated that date addressed to Alan H. Woodward, et al., executors, estate of J. H. Woodward, under symbols "ET-102-C1.R.-LCM—District of Alabama—Estate of J. H. Woodward—date of death December 15, 1917", which decision referred to and adopted a number of determinations made in a previous letter from the said Commissioner, dated October 12, 1920. Said decision determined the following expenses of administration and taxes, and determined that the estate of Joseph H. Woodward had the following values at the time of his death:

Gross value of real estate, $385,771.49 (included in which was a value of $40,000 for his residence in Birmingham, and a value of $37,000 for his winter home in Orange County, Florida); gross value of personal property, $4,497,851.37; expenses of administration $242,045.70, and the Federal estate tax, $617,-483.89, making the aggregate expenses of administration $859,529.59. Under the law of Alabama the said expenses were primarily chargeable to the personal property, and the net personal estate was $3,638,-321.78.

(b) Above and beyond the value of the dower rights of Martha B. Woodward in the real property

owned by Joseph H. Woodward at the time of his death, which dower rights had a substantial value, the said Martha B. Woodward, under Section
7 3763 of the Code of Alabama of 1907 (now Section 7374 of the Code of Alabama of 1923), was entitled, upon the death of Joseph H. Woodward, to a child's part in the personal estate of Joseph H. Woodward. Joseph H. Woodward had three children, all of whom survived him, namely, Alan H. Woodward, Mrs. Margaret W. Hopkins and Mrs. Bertha W. Underwood. Under said section of the Code of Alabama, the decedent, Joseph H. Woodward, having had three children, Martha B. Woodward was entitled, upon his death, to a child's part of one-fourth of the value of his personal estate, and under said provision she then became entitled to, and was seized and possessed of, one-fourth of the net personal estate of the said Joseph H. Woodward, or personal property to the value of $909,580.44, wholly above and beyond her dower right in his real property, to which she was also entitled.

(c) Joseph H. Woodward died testate, and his last will and testament, with a codicil thereto, was duly probated in the Probate Court of Jefferson County, Alabama, on December 21, 1917.

(d) Under his will and codicil, Joseph H. Woodward devised to Martha B. Woodward a life estate in his residence in Birmingham and a life estate in his winter home in Orange County, Florida. She was then of an advanced age, and the cash value
8 of these life estates was, upon information and belief, not in excess of $30,000, and, upon information and belief, said sum was less than the value of her dower right, which, under the law of Alabama and the law of Florida, in which two states all of his real property was situated, is a one-third in-

terest for life in the real estate of which her deceased husband died seized and possessed.

(e) By Item 7 of the codicil to the will of Joseph H. Woodward (a true and correct copy of which is attached hereto marked Exhibit B and made a part hereof), he devised and bequeathed all of his residuary estate of every kind and character, of which he died seized and possessed, to the petitioner, Title Guarantee Loan & Trust Company, a corporation of Birmingham, Alabama, as trustee, and the said trustee was, by the terms of said Item 7, directed to pay the cost and expense incident to the preservation of the trust estate, and further to pay from the income from the trust estate $25 per month to one Marion Wallace during her life, and to pay all of the rest of the net income from the trust estate, as and when received, to certain persons, his wife, Martha B. Woodward, to receive one-fourth thereof, and the other said persons to receive the remaining three-fourths in the proportions set forth in the said Item 7. The petitioner, as trustee, has at all times strictly performed its duties as trustee.

From the time the petitioner qualified as such trustee to the date of Martha B. Woodward's death, the petitioner disbursed the said one-fourth of all of the rest of the net income from the trust estate, as and when received, to Martha B. Woodward. The remaining three-fourths of the said net income, as well as the $25 per month to Marion Wallace, has at all times been disbursed by the petitioner to those persons in full, as and when received, and, upon information and belief, such persons accounted for the same upon their individual income tax returns at all times; and the respondent does not in his said deficiency notice assert any claim against the petitioner on account of such disbursements, but has duly allowed all of such disbursements as additional deductions in computing the net income of the trust

estate, as required by Section 219 (b) (2) of the Revenue Acts of 1924 and 1926, and corresponding provisions of prior revenue laws, and the deficiency or deficiencies asserted in said deficiency notice are based wholly upon the sums to which Martha B. Woodward was entitled and which were distributed to her during the calendar years 1924, 1925, 1926 and 1927.

(f) Under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907 (now Sections 10593 and 10594 of the Code of Alabama of 1923), a widow may in all cases dissent from the will of her husband, and, in lieu of the provisions made for her by such will, take her dower in the land and such portion of the personal estate as she would be entitled to in the case of intestacy. The said provisions of law provide for the filing of a written dissent with the Judge of probate of the county in which the will is probated within twelve months from the probating of the will. Martha B. Woodward, however, did not dissent from the will and codicil of Joseph H. Woodward, but accepted the provisions made for her therein, and received to the date of her death the income allotted to her by Item 7 of the codicil. From the date of the death of Joseph H. Woodward until the date of her death, namely, May 15, 1928, she received a total of $658,802.69 as such income, which was the full amount of the income to which she was entitled under said Item 7, the petitioner having, as trustee, pursuant to the terms of such provision, disbursed all of such income and retained in the trust estate only the principal or corpus thereof. Said sum of $658,802.69 included the following sums, which were distributed to Martha B. Woodward during 1924, 1925, 1926 and 1927, and which were asserted as the net income of the petitioner, as trustee of the estate of

J. H. Woodward, and upon which the deficiencies for those years are based, as are more fully set forth in the said deficiency notice, namely:

1924	.....	$119,891.11
1925	.....	70,467.01
1926	.....	73,403.43
1927	.....	73,030.94

(g) Said Martha B. Woodward, for each of the calendar years after the death of Joseph H. Woodward, through and including the year 1927, duly filed income tax returns with the Collector of Internal Revenue at Birmingham, Alabama, and upon her said returns she reported all of the income received by her at all times under Item 7 of the said codicil from this petitioner, as trustee, (including the sums received by her during 1924, 1925, 1926 and 1927, as set forth in paragraph (f) hereof) with the exception of $33,852, which was paid to her between January 1, 1928 and April 4, 1928; that is, she reported upon her returns for years subsequent to Joseph H. Woodward's death, and through the calendar year 1927, an aggregate of $624,950.69, and upon said returns she paid the full income tax upon said $624,950.69, in the same manner as if the said $629,950.69, representing all distributions received by her through the calendar year 1927, were taxable beyond question. She did not, as already stated, pay taxes upon the $33,852 received in 1928, having died before her return was due for 1928.

(h) This petitioner, as trustee of said trust estate, duly filed with the Collector of Internal Revenue at Birmingham, Alabama, fiduciary returns of
12 income for all of the years during which this petitioner has acted as trustee under the said trust, and, in particular, with reference to the years 1924, 1925, 1926 and 1927, this petitioner filed upon

Form 1041 with the said Collector fiduciary returns of income in the name of "Estate of J. H. Wooward, Title Guarantee Loan & Trust Company, Birmingham, Alabama" for the calendar years 1924, 1925, 1926 and 1927 as follows:

On March 4, 1925, a return on said form, for the calendar year 1924, showing a net income of $479,-864.45, and the distribution of the entire amount of said net income to the said beneficiaries, including $119,891.11, to Martha B. Woodward;

On January 27, 1926, a return on said form, for the calendar year 1925, showing a net income of $282,-168.04, and the distribution of the entire amount of said net income to the said beneficiaries, including $70,467.01, to Martha B. Woodward;

On March 7, 1927, a return on said form, for the calendar year 1926, showing a net income of $293,-913.73, and the distribution of the entire
13 amount of said net income to the said beneficiaries, including $73,403.43, to Martha B. Woodward;

On February 14, 1928 a return on said form for the calendar year 1927, showing a net income of $292,-423.74, and the distribution of the entire amount, except the capital gain stated below, to the said beneficiaries, including $73,030.94, to Martha B. Woodward. On said return for 1927 there was reported a capital gain of $4,992. as undistributable income from the sale of corpus, which figure, added to the said sum of $73,030.94, distributed to Martha B. Woodward, results in the sum of $78,022.94, the figure alleged by the respondent in the deficiency notice as the taxable income for the year 1927.

The facts and figures set forth in the said fiduciary returns for 1924, 1925, 1926 and 1927 were correct facts and figures, and the same are accepted as correct in the respondent's said deficiency notice, the only variation between the returns of the petitioner and the respondent's deficiency notice being that the petitioner treated the net income of the estate for those years as not being taxable to the estate, while the respondent in his deficiency notice treats the sums distributed to Martha B. Woodward for 1924, 1925 and 1926, and the sum distributed to her for 1927, plus the capital gain of $4,992, as being taxable to the petitioner as trustee of the estate of J. H. Woodward.

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(i.) Subsequent to the death of Martha B. Woodward, namely, on May 30, 1927, Alan H. Woodward was duly qualified by the Probate Court of Jefferson County, Alabama, as executor under her will. Upon information and belief said Alan H. Woodward, as executor of the estate of Martha B. Woodward, deceased, duly filed on September 17, 1928 with the Collector of Internal Revenue at Birmingham, Alabama claims for refund on Form 843 for 1924, 1925, 1926 and 1927 claiming the refund of $33,719.08 for 1924, $9,708.59 for 1925, $8,746.44 for 1926 and $8,868.69 for 1927, alleging in said claims for refund that such amounts should be refunded to him as executor upon the ground that to the date of her death Martha B. Woodward received in the aggregate $658,802.69, being the full amount of income to which she was entitled under Item 7 of the codicil of Joseph H. Woodward's will, which, added to the cash value of the life estates in the residence in Birmingham and the winter home in Orange County, Florida, of a cash value of not in excess of $30,000, or a total receipt by her of not more than $687,802.69, was less than the consideration paid by her for the income under

15

Item 7 of the will of Joseph H. Woodward, namely, her statutory interest of $909,580.44 in the personal estate of Joseph H. Woodward, plus the value of her dower interest in the real property of which he died seized and possessed, and in said claims it was alleged that no sums received by her under said Item 7 of the codicil to the will of Joseph H. Woodward would be taxable until she should have received an amount in excess of the consideration so paid by her, which never occurred, and that all sums received by Martha B. Woodward at all times from the petitioner under said Item 7 of the codicil, including the said amounts received by her during 1924, 1925, 1926 and 1927, were not subject to tax, and that she had erroneously paid income taxes thereon. In said claims for refund were cited the cases of United States v. Bolster, 26 Fed (2d) 760 and Warner v. Walsh, 15 Fed. (2d) 367 as authorities supporting the refunds claimed. Upon information and belief, to the date of the filing of this petition the respondent has neither allowed nor paid the refunds thus claimed.

16 Wherefore, the petitioner prays that this Board may hear the proceeding and:

(1.) Find that Martha B. Woodward was a beneficiary under the estate or trust of Joseph H. Woodward, her proportion of the income of which was to be distributed currently to her by the petitioner, a fiduciary, and that the same was so distributed to her, in the same manner as to the other beneficiaries; and

(2.) Determine that the fact that the distributions received by Martha B. Woodward from the estate or trust for 1924, 1925, 1926 and 1927 may have been nontaxable to her is no bar to the allowance of the same as additional deductions in computing the net

income of the estate or trust, under Section 219 (b) (2) of the Revenue Acts of 1924 and 1926; and

(3.) Determine that the sums distributed to Martha B. Woodward, namely: For 1924, $119,891.11, for 1925, $70,467.01, for 1926 $73,403.43, and for 1927, $73,030.94, should be allowed as additional deductions in computing the net income of the estate or trust as provided by Section 219 (b) (2) of the Revenue Acts of 1924 and 1926; and

(4.) Grant such other and further relief as, under the facts of this appeal, may to the Board seem proper.

OSCAR W. UNDERWOOD, JR.
H. C. KILPATRICK,
717 Southern Building, Washington, D. C. Attorneys for the Petitioner.

17 State of Alabama,
County of Jefferson, ss.

E. L. Smith, being duly sworn, says that he is the Vice President of the Title Guarantee Loan & Trust Company, a corporation, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

(Sgd.) E. L. SMITH.

Subscribed and sworn to before me this 9th day of April, 1929.

(Seal) (Sgd.) M. E. MOSELEY,
Notary Public.

18 EXHIBIT A.

Treasury Department Washington.

Feb. 26, 1929.

Title Guarantee Loan and Trust Company, Trustee,
Estate of J. H. Woodward,
Birmingham, Alabama.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924, 1925, 1926 and 1927 discloses a deficiency of $44,344.11, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a re-determination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Sgd.) C. B. ALLEN,
Deputy Commissioner.

Inclosures: Statement, Form 866, Form 882, Form 7928.

19 Statement.

IT:AR:B-4.
JHC-60D.

In Re: Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward, Birmingham, Alabama.

Tax Liability.

Years.	Corrected Tax Liability.	Tax Previously Assessed.	Deficiency.
1924	$24,462.71	None	$24,462.71
1925	6,094.92	None	6,094.92
1926	6,644.72	None	6,644.72
1927	7,184.14	$52.38	7,131.76
Totals	$44,386.49	$52.38	$44,334.11

The adjustments recommended in the report of the Internal Revenue Agent in Charge at Nashville, Tennessee, have been approved as submitted.

The only adjustment made is the inclusion in the return of the estate as taxable income the amount distributed to Mrs. Martha B. Woodward, widow of the deceased, in accordance with the provisions of Treasury Decision 4257, published in Internal Revenue Bulletin, Volume VIII-4, Page 15, and claims filed by Mrs. Woodward. The income received by Mrs. Woodward under the will of J. H. Woodward has been considered as payment for her dower right. The payment is therefore considered a capital item and not deductible in determining taxable income of the estate.

The adjusted returns are as follows:

1924.

Interest		$56,148.03
Rent		368.12
Dividends		436,681.25
Total		$493,197.40
Taxes paid	$3,103.20	
Trust Expenses	10,229.75	
Distributed to beneficiaries	359,973.34	373,306.29
Balance taxable to estate		$119,891.11

20 Statement.

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Net income adjusted		$119,891.11
Less:		
Dividends	$109,170.31	
Personal exemption	1,000.00	110,170.31
Income subject to normal tax		$ 9,720.80
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $1,720.80		103.25
Surtax on $119,891.11		24,379.71
Total tax		$24,722.96
Less: Tax paid at source		260.25
Tax assessable		$24,462.71

Tax previously assessed	None
Deficiency in tax	$24,462.71

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

1925.

Interest received		$ 5,188.86
Interest on tax-free covenant bonds		52,050.00
Rent		325.48
Dividends		241,379.50
Total income		$298,943.84
Taxes paid	$ 3,204.31	
Trust expense	13,571.49	
Income distributed to beneficiaries	211,701.03	228,476.83
Balance income taxable to estate		$70,467.01

21 Statement.

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Net income adjusted		$70,467.01
Less:		
Dividends	$60,344.87	
Personal exemption	1,500.00	61,844.87
Income subject to normal tax		$8,622.14
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $622.14		31.11

Surtax on $70,467.01	6,144.06
Total tax	$6,355.17
Less: Tax paid at source	260.25
Tax assessable	$6,094.92
Tax previously assessed	None
Deficiency in tax	$6,094.92

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

1926.

Interest received	$ 56,389.52
Rents	306.38
Dividends	251,426.00
Total	$308,121.90
Taxes paid	3,459.61
Trust expense	10,748.56
Distributed to beneficiaries	220,510.30
Balance taxable to estate	$73,403.43

22 Statement.

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Net income adjusted		$73,403.43
Less:		
Dividends	$62,856.50	
Personal exemption	1,500.00	64,356.50
Income subject to normal tax		$9,046.93

Normal tax at 1½% on $4,000.00	60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $1,046.93	52.35
Surtax	6,672.62
Total tax	$6,904.97
Less: Tax paid at source	260.25
Tax assessable	$6,644.72
Tax previously assessed	None
Deficiency in tax	$6,644.72

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

1927.

Interest received	$ 4,397.63
Interest on tax-free covenant bonds	52,050.00
Other income	512.15
Profit on sale	4,992.00
Dividends	251,338.50
Total income	$313,290.28
Taxes paid	$ 4,190.22
Trust expense	11,684.32
Distributed to beneficiaries	219,392.80
Balance taxable to estate	$78,022.94

23 Statement,

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Income adjusted		$78,022.94
Less: Capital net gain		4,992.00
Income subject to normal tax		$73,030.94
Less:		
Dividends	$62,834.63	
Personal exemption	1,500.00	64,334.63
Income subject to normal tax		$8,696.31
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $696.31		34.82
Surtax on $73,030.94		6,605.57
Tax at 12½% on $4,992.00		624.00
Total tax		$7,444.39
Less: Tax paid at source		260.25
Tax assessable		$7,184.14
Tax previously assessed		52.38
Deficiency in tax		$7,131.76

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to her.

24 EXHIBIT B.

Item 7 of the codicil to the will of Joseph H. Woodward, dated March 16, 1911.

Item 7 All the rest and residue of the property, both real, personal and mixed property of every kind and character of which I die seized and possessed, and wheresoever situated, I give, devise and bequeath to the Title Guarantee Loan & Trust Company, a body corporate under the laws of Alabama, with its principal place of business in Birmingham, Alabama, (and hereinafter called trustee) in trust with the powers and for the uses and purposes hereinafter set forth, to-wit:

(a.) My executors are to turn over, as soon as practicable, the trust property to the trustee, and the trustee shall preserve, manage, look after and control said trust property, collecting the rents, income and profits therefrom; with power in the trustee necessary or deemed necessary for these purposes and for the protection of said trust property; or any part thereof. The trustee shall have the authority and power to sell and convey, at private sale, and without order of Court, any of the trust property coming into its custody at any time and reinvest the proceeds of any sale or sales or any money coming into its custody as trustee from time to time as it deems best, provided, however, that the trustee shall have no authority or power to sell any property belonging to the trust estate without the written approval of my son, Alan H. Woodward and Reginald H. Banister, or one of them, so long as they or either of them may live, and are competent to act, and are personally present in the United States, and provided further that said trustee shall have no authority or power to make a reinvestment of the trust funds at any one time amounting to a sum exceeding Ten Thousand ($10,000.00) Dollars, without the written

approval of my son, Alan H. Woodward, and Reginald H. Bannister, or one of them, so long as they, or either of them may live and are competent to act and are personally present in the United States.

(b.) The trustee is authorized and directed to pay from income all cost and expense incident to the protection and preservation of the trust estate, including taxes and insurance on the trust property, and including taxes, insurance and repairs of the property devised by my wife for life, and compensation to the trustee.

(c.) I direct the trustee to pay over from the net income from the trust estate the sum of Twenty-five ($25.00) Dollars per month to Marion Wallace during the life of Marion Wallace.

All the rest and residue of the net income from the trust estate, I direct the trustee to pay over as and when received share and share alike, to my wife, Martha Woodward, my son Alan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the survivors of them (except the share of my daughter Margaret W. Hopkins is to be subdivided as hereinafter set forth).

The share of the net income set aside for my daughter, Margaret W. Hopkins, I direct to be subdivided, and one-third of same is to be paid over to Margaret Evins Spencer (if she be living), and one-third is to be paid over to Josephine W. Evins after said Josephine W. Evins arrives at the age of twenty-one years, two-thirds to be paid over to my said daughter, Margaret W. Hopkins, until Josephine W. Evins arrives at the age of twenty-one years, but with the expectation that my daughter Margaret W. Hopkins will provide for the support, maintenance and education of said Josephine W. Evins until she arrives at the age of

twenty-one years, one-third to be paid over to my daughter Margaret W. Hopkins after Josephine W. Evins arrives at the age of twenty-one years. In the event either Margaret W. Spencer or Josephine W. Evins should die, if Margaret W. Hopkins be living, she is to take the share of the income which the deceased would have taken if living. Upon the death of either of my children, the child or children of my deceased child shall take the share of the income which the parent would have taken if living.

(d.) This trust is to continue during the life of the survivor of my three children, Alan H. Woodward, Bertha W. Underwood, and Margaret W. Hopkins, and the trust is to terminate at the time of the death of the survivor of my three children.

(e.) In the event my daughter Bertha W. Underwood should die leaving no child or children surviving her, then and in that event if her husband, Oscar W. Underwood, be living, I direct the trustee to deliver to Oscar W. Underwood, as a gift to him, Fifty Thousand ($50,000.00) Dollars, face amount of bonds bearing interest at the rate of 5% per annum from bonds belonging to the trust estate, and in the custody of the trustee, to be selected by my son and Reginald H. Banister, or the survivor of them, if they are competent to act, and otherwise to be selected by the trustee.

This conditional gift to my son-in-law Oscar W. Underwood is in no way intended as an expression of a preference of him over my son-in-law, Thomas
26 W. Hopkins, but is intended as an equalization between my children, as my daughter Bertha W. Underwood now has no child, and this gift is conditioned on my said daughter at her death leaving no child surviving her, whereas, my daughter Margaret W. Hopkins has two children, and they will share as beneficiaries on final division of my estate.

(f.) It is my will and I direct the trustee on the termination of this trust under the provisions hereof, to divide the trust property, share and share alike, between my grandchildren then living, the child or children or descendants of any deceased grandchild taking the share which the parent would have taken if living, provided, however, that in the event my wife, Martha Woodward, should be living when the trust terminates under the provisions hereof, the trustee is to set aside from the trust property in its custody the sum of One Hundred Thousand ($100,000.00) Dollars to be held and used by the trustee to the extent necessary for the comfortable support and maintenance of my wife during her life, and after her death, the balance of said trust fund of One Hundred Thousand ($100,000.00) Dollars, if any, shall be divided between my grandchildren on the same basis as set forth in this paragraph.

(g.) The trustee, if required, shall give bond with surety company as security to guarantee faithful performance of its duties, in such amount and at such time or times as may be in writing required by my wife, and children, or a majority of them or by the survivors or survivor of them, but at the cost and expense of the trust estate. I direct that the trustee shall rent and keep a safety-deposit box and keep all securities such as principal notes, stocks and bonds in such safety box, and that it must take at least three keys to open said box, and that one of said keys shall be turned over to my wife, Martha Woodward, and retained by my wife, Martha Woodward, or my son, Alan H. Woodward, or Reginald H. Banister (as they may from time to time agree among themselves), and the trustee shall not enter said box without the presence of either my wife or my son, or Reginald H. Banister, or some one designated in writing by them, or by the custodian of the key, so long as they, or either of them, be living

and competent to act. In the event my said wife and son and Reginal H. Banister should all die or become incompetent to act before the termination of this trust, then my daughters or one of them, if they be living and competent to act, shall be the custodian of the key to the box, and be present in person or by agent designated in writing at the opening of the box, or in the event both of my daughters should be dead or incompetent to act, my adult grandchildren living shall in writing to the trustee designate a custodian of the key who is to be present in person or by duly designated agent at the opening of the box.

27 In making division of the trust property on the termination of this trust, under the provisions hereof, the trustee shall have the authority and power to divide the trust property in kind or partly in kind, or may sell and convey at private sale and without order of Court, such of the trust property and security as it may deem necessary, and divide the proceeds or equalize the division with the proceeds.

(h.) It is my will, and I direct that all stock (in corporations) belonging to the trust estate shall be represented and voted at all meetings of stockholders by or under the direction of my son Alan H. Woodward so long as he may live, and be competent to act, or by Reginald H. Banister so long as he may live and be competent to act, and to this end, the trustee is directed to execute to my son, or to whomsoever he may in writing designate, a proxy or power of attorney authorizing the voting of stock from time to time, or if my son should fail or decline to request a proxy or power of attorney, a proxy or power of attorney shall be executed by the trustee to Reginald H. Banister, or to whomsoever he may in writing designate, authorizing the voting of the stock.

The trustee shall not be required to file an inventory of the trust property, in its custody, in any Court, but the trustee shall, at all times, have and keep an inventory of the trust property on hand, and shall exhibit such inventory at all reasonable times to any person beneficially interested who desires to see the same.

(i.) The trustee shall be entitled to fair and reasonable compensation for all services in administering the trust under the provisions hereof, to be deducted from the income as received, and I direct that my son, Alan H. Woodward, and Reginald H. Banister, if living at the time of my death, or the survivor of them, shall designate in writing and agree with the trustee as to the amount that they consider fair and reasonable compensation to be paid to the trustee, and the compensation if agreed to by the trustee shall be the compensation which the trustee is to receive, and if the trustee does not agree to the compensation fixed by my son and Reginald H. Banister the trustee can resign or be removed under the provisions hereof.

28 (j.) The trustee may resign this trust at any time, or the trustee may be removed as trustee at any time by my wife and son and Reginald H. Banister, or any two of them, during their lives, without cause, and a corporation appointed as successor trustee, and in the event a successor trustee is appointed, each and all of the powers conferred upon the trustee under the provisions hereof, shall pass to and inure to the successor trustee, and in case of the resignation of the trustee, the said three parties, or any two of them, shall appoint a successor trustee, and in like manner, at any time, a trustee may be removed and a successor trustee appointed, provided, however, that no trustee shall be removed until all compensation to which the trustee is entitled is paid.

Any resignation or appointment of a trustee under the provisions hereof, shall be in writing, executed by the proper parties, acknowledged in the same way as deeds are required to be acknowledged, under the laws of Alabama, and filed for record in the probate office of Jefferson County, Alabama.

29

ANSWER.

United States Board of Tax Appeals.

Filed May 23, 1929.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

vs. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the petition.

2. Admits all the material allegations contained in paragraph 2 of the petition.

3. Admits all the material allegations contained in paragraph 3 of the petition.

4—(a), (b), (c), (d) and (e). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.

4—(f). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated February 26, 1929.

5. Denies all the material allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

J. ARTHUR ADAMS,
Special Attorney, Bureau of Internal Revenue.

PETITION.

United States Board of Tax Appeals.

Filed Dec. 8, 1930.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
v. Docket No.51185.
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Com-

missioner of Internal Revenue in his notice of deficiency, (IT: AR: C—1: MEH—60D) dated October 15, 1930, and as a basis of its proceeding alleges as follows:

(1.) The petitioner is a corporation, with principal office at the Title Guarantee Building, Birmingham, Alabama, and is trustee under the will of J. H. Woodward, as hereinafter set forth.

(2.) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner by registered mail on October 15, 1930, and was received by the petitioner in due course of mail.

(3.) The taxes in controversy are income taxes for the calendar year 1928, and for $1,130.84.

32 (4.) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a.) The respondent erred in determining that any deficiency is due for the year 1928.

(b.) Under the applicable provisions of Section 161 of the Revenue Act of 1928, the respondent erred in determining that the petitioner is liable for any tax for the year 1928.

(c.) The respondent erred in not allowing, under the provisions of Section 161 (b) and Section 162 (b) of the Revenue Act of 1928 as an additional deduction in computing the net income of the estate or trust of Joseph H. Woodward for the calendar year 1928, the amount of $33,852.00 distributed currently to Martha B. Woodward by the petitioner, as fiduciary, to her as beneficiary of the said estate or trust.

(d.) The respondent erred in not allowing as an additional deduction in computing the net income of the estate or trust of J. H. Woodward, pursuant to Section 161 (b) and Section 162 (b) of the Revenue Act of 1928 for the calendar year 1928, all sums distributed by the petitioner as fiduciary to Martha B. Woodward as beneficiary under the trust created by the will of J. H. Woodward, and, as a result of not allowing such additional deductions, erred in determining an adjusted net income of the petitioner as trustee of said estate or trust for said calendar year in the amount of $33,852.00.

33 (e.) The respondent erred in not determining, under Section 161 (b) and Section 162 (b) of the Revenue Act of 1928, that there was no taxable net income for the year 1928.

(5.) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a.) Martha B. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, was the wife of Joseph H. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, who died on December 15, 1917. The said Martha B. Woodward died on May 13, 1928.

(b.) Joseph H. Woodward died on December 15, 1917, seized and possessed of real and personal property having a gross value at the time of his death of $4,883,622.56, and a value as a net estate of $4,641,577.16, according to the final determination of D. H. Blair, Commissioner of Internal Revenue, by decision dated December 14, 1922, contained in a letter dated that date addressed to Alan H. Woodward, et al., executors, estate of J. H. Woodward, under symbols "ET—102—C1. R.—LCM—District of Alabama—

Estate of J. H. Woodward date of death December 15, 1917", which decision referred to and adopted a number of determinations made in a previous letter from the said Commissioner, dated October 12, 1920. Said decision determined the following expenses of administration and taxes, and determined that the estate of Joseph H. Woodward had the following values at the time of his death:

34 Gross value of real estate, $385,771.49 (included in which was a value of $40,000 for his residence in Birmingham, and a value of $37,000 for his winter home in Orange County, Florida); gross value of personal property, $4,497,851.37; expenses of administration $242,045.70, and the Federal estate tax, $617,483.89, making the aggregate expenses of administration $859,529.59. Under the law of Alabama the said expenses were primarily chargeable to the personal property, and the net personal estate was $3,638,321.78.

(b.) Above and beyond the value of the dower rights of Martha B. Woodward in the real property owned by Joseph H. Woodward at the time of his death, which dower rights had a substantial value, the said Martha B. Woodward, under Section 3763 of the Code of Alabama of 1907 (now Section 7374 of the Code of Alabama of 1923), was entitled, upon the death of Joseph H. Woodward, to a child's part in the personal estate of Joseph H. Woodward. Joseph H. Woodward had three children, all of whom survived him, namely, Alan H. Woodward, Mrs. Margaret W. Hopkins and Mrs. Bertha W. Underwood. Under said section of the Code of Alabama, the decedent, Joseph H. Woodward, having had three children, Martha B. Woodward was entitled, upon his death, to a child's part of one-fourth of the value of his personal estate, and under said provision she then became entitled to,

and was seized and possessed of, one-fourth
35 of the personal estate of the said Joseph H. Woodward, or personal property to the value of $909,580.44, wholly above and beyond her dower right in his real property, to which she was also entitled.

(c.) Joseph H. Woodward died testate, and his last will and testament, with a codicil thereto, was duly probated in the Probate Court of Jefferson County, Alabama, on December 21, 1917.

(d.) Under his will and codicil, Joseph H. Woodward devised to Martha B. Woodward a life estate in his residence in Birmingham and a life estate in his winter home in Orange County, Florida. She was then of an advanced age; and the cash value of these life estates was, upon information and belief, not in excess of $30,000, and, upon information and belief, said sum was less than the value of her dower right, which, under the law of Alabama and the law of Florida, in which two states all of his real property was situated, is a one-third interest for life in the real estate of which her deceased husband died seized and possessed.

(e.) By Item 7 of the codicil to the will of Joseph H. Woodward he devised and bequeathed all of his residuary estate of every kind and character, of which he died seized and possessed, to the petitioner, Title Guarantee Loan & Trust Company, a corporation of
Birmingham, Alabama, as trustee, and the
36 said trustee was, by the terms of said Item 7, directed to pay the cost and expense incident to the preservation of the trust estate, and further to pay from the income from the trust estate $25 per month to one Marion Wallace during her life, and to pay all of the rest of the net income from the trust

estate, as and when received, to certain persons, his wife, Martha B. Woodward, to receive one-fourth thereof, and the other said persons to receive the remaining three-fourths in the proportions set forth in the said Item 7. The petitioner, as trustee, has at all times strictly performed its duties as trustee. From the time the petitioner qualified as such trustee to the date of Martha B. Woodward's death, the petitioner disbursed the said one-fourth of all of the rest of the net income from the trust estate, as and when received, to Martha B. Woodward. The remaining three-fourths of the said net income, as well as the $25 per month to Marion Wallace, has at all times been disbursed by the petitioner to those persons in full, as and when received, and, upon information and belief, such persons accounted for the same upon their individual income tax returns at all times; and the respondent does not in his said deficiency notice assert any claim against the petitioner on account of such disbursements, but has duly allowed all of such disbursements as additional deductions in computing the net income of the trust estate, as required by Section 162 (B) of the Revenue Act of 1928, and corresponding provisions of prior revenue laws, and the deficiency or deficiencies asserted in said deficiency notice are based
37 wholly upon the sums to which Martha B. Woodward was entitled and which were distributed to her during the calendar year 1928.

(f.) Under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907 (now Sections 10593 and 10594 of the Code of Alabama of 1923), a widow may in all cases dissent from the will of her husband, and, in lieu of the provisions made for her by such will, take her dower in the land and such portion of the personal estate as she would be entitled to in the case of intestacy. The said provisions of law provided for the filing of a written dissent with the

Judge of probate of the county in which the will is probated within twelve months from the probating of the will. Martha B. Woodward, however, did not dissent from the will and codicil of Joseph H. Woodward, but accepted the provisions made for her therein, and received to the date of her death the income allotted to her by Item 7 of the codicil. From the date of the death of Joseph H. Woodward until the date of her death, namely, May 15, 1928, she received a total of $658,802.69 as such income, which was the full amount of the income to which she was entitled under said Item 7, the petitioner having, as trustee, pursuant to the terms of such provision, disbursed all of such income and retained in the trust estate only the principal or corpus thereof. Said sum of $658,802.69 included the sum of $33,852.00, which was distributed to Martha B. Woodward during the period from January 1 to May 13, 1928, and which is asserted as the net income of the petitioner, as trustee of the estate of J. H. Woodward, and upon which the deficiency for the year 1928 is based, as is more fully set forth in the said deficiency notice.

38

(g.) This petitioner, as trustee of said trust estate, duly filed with the Collector of Internal Revenue at Birmingham, Alabama, fiduciary returns of income for all of the years during which this petitioner has acted as trustee under the said trust, and, in particular, with reference to the year 1928, this petitioner on February 7, 1929, filed upon Form 1041 with the said Collector a fiduciary return of income in the name of "Estate of J. H. Woodward, Title Guarantee Loan & Trust Company, Birmingham, Alabama" for the calendar year 1928, showing a net income of $345,246.01, and the distribution of the entire amount of said net income to the said beneficiaries, including $33,852.00 to Martha B. Woodward.

The facts and figures set forth in the said fiduciary return for 1928 were correct facts and figures, and the same are accepted as correct in the respondent's said deficiency notice, the only variation between the return of the petitioner and the respondent's deficiency notice being that the petitioner treated the net income of the estate for the year 1928 as not being taxable
39 to the estate, while the respondent in his deficiency notice treats the sums distributed to Martha B. Woodward during the period from January 1 to May 13, 1928, as being taxable to the petitioner as trustee of the estate of J. H. Woodward.

Wherefore, the petitioner prays that this Board may hear the proceeding and:

(1.) Find that Martha B. Woodward was a beneficiary under the estate or trust of Joseph H. Woodward, her proportion of the income of which was to be distributed currently to her by the petitioner, a fiduciary, and that the same was so distributed to her, in the same manner as to the other beneficiaries; and

(2.) Determine that the fact that the distributions received by Martha B. Woodward from the estate or trust for 1928 may have been non-taxable to her is no bar to the allowance of the same as additional deductions in computing the net income of the estate or trust, under Section 162 (b) of the Revenue Act of 1928; and

(3.) Determine that the amount of $33,852.00 distributed to Martha B. Woodward in 1928 should be allowed as an additional deduction in computing the net income of the estate or trust as provided by Section 162 (b) of the Revenue Act of 1928; and

(4.) Grant such other and further relief as, under the facts of this appeal, may to the Board seem proper.

OSCAR W. UNDERWOOD, JR.
H. C. KILPATRICK,
717 Southern Building Washingfon, D. C. Attorneys for the Petitioner.

State of Alabama,
County of Jefferson, ss.

E. L. Smith, being duly sworn, says that he is the Vice President of the Title Guarantee Loan & Trust Company, a corporation, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

E. L. SMITH.

Subscribed and sworn to before me this 4th day of December, 1930.

ETHEL M. WARE,
Notary Public.

"EXHIBIT A.".

Treasury Department Washington.

October 15, 1930.

Title Guarantee Loan & Trust Company, Trustee,
Estate of J. H. Woodward,
Birmingham, Alabama.

Sirs:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $1,130.84 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P—7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

42 STATEMENT.

IT:AR:C—1—MEH—60D.

In re: Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward, Birmingham, Ala.

Tax Liability.

Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
1928	$1,130.84	None	$1,130.84

. The report of the internal revenue agent in charge at Nashville, Tennessee, for the year 1928, has been reviewed and accepted as submitted.

Net income reported on return (1040)		None
Add:		
1. Dividends		$28,732.62
2. Other income		5,119.38
Total net income		$33,852.00
Less:		
Dividends	$28,732.62	
Personal exemption	1,500.00	30,232.62
Income subject to normal tax		$ 3,619.38
Normal tax at 1 1/2% on $3,619.38		54.28
Surtax on $33,852.00		1,206.68
Total tax		$ 1,260.96
Less: Tax paid at source		130.12
Tax assessable		$ 1,130.84
Tax previously assessed		None
Deficiency in tax		$ 1,130.84

43 . Explanation of Changes.

1 and 2. These items reported on form 1041 as having been paid to Mrs. Woodward have been included for income tax purposes on form 1040 for the estate.

In accordance with I. T. 2480, Cumulative Bulletin VIII-2, page 141, it is held that the income from property held by an estate or trust to satisfy annual payments to a widow in lieu of her dower or statutory interest is not an allowable deduction in the return of

the estate or trust prior to the time such payments equal the value of her dower or statutory interest in her deceased husband's estate.

Inasmuch as the revenue agent states that the total payments received by Mrs. Woodward were less than the value of her dower or statutory rights, the amounts paid to her in 1928 were taxable to the estate.

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

ANSWER.

44 United States Board of Tax Appeals.

Filed Jan. 26, 1931.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs. Docket No. 51185.
Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

(1.) Admits all the material allegations contained in paragraph (1) of the petition.

(2.) Admits all the material allegations contained in paragraph (2) of the petition.

(3.) Admits that the tax in controversy is income tax for the year 1928, but denies that the amount of

tax in controversy is the amount shown in paragraph (3) of the petition.

(4)—(a), (b), (c), (d) & (e). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph (4) of the petition.

(4)—(f.) Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated October 15, 1930.

(5.) Denies all the material allegations contained in paragraph (5) of the petition.

(6.) Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

J. ARTHUR ADAMS,
Special Attorney, Bureau of Internal Revenue.

Title Guarantee Loan & Trust Company, Trustee of the Estate of J. H. Woodward, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 43615, 51185.

H. C. Kilpatrick, Esq., for the petitioner.
Prew Savoy, Esq., for the respondent.

MEMORANDUM OPINION.

45 United States Board of Tax Appeals.

TRAMMELL:

These proceedings are for the redetermination of deficiencies in income taxes for the years 1924, 1925, 1926 and 1927, in Docket No. 43615 in the amounts of $24,462.71, $6,094.92, $6,644.72 and $7,131.76, respectively, and for the year 1928 in Docket No. 51185, in the amount of $1,130.84.

The question involved is whether the petitioner is entitled to a deduction on account of annual payments made to the widow in lieu of dower.

The two proceedings were consolidated for hearing and the facts either admitted in the answer or stipulated.

1. The petitioner is a corporation with its principal office in Birmingham, Alabama, and is trustee under the will of J. H. Woodward, deceased. J. H. Woodward (hereinafter called the testator), while a resident of Alabama, died testate December 15, 1917. The testator's last will and testament, dated March 16, 1911, together with a codicil thereto, dated August 7, 1915, were admitted to probate in the Probate Court of Jefferson County, Alabama, on December 21, 1917, and letters testamentary were issued by the Court to the executors therein named.

46 2. After making specific bequests, the testator disposed of the risiduary estate by Item 7 of the codicil, the material portions of which are as follows:

"Item 7—All the rest and risidue of the property, both real, personal and mixed property of every kind

and character of which I die seized and possessed, and wheresoever situated, I give, devise and bequeath to the Title Guarantee Loan & Trust Company, a body corporate under the laws of Alabama, with its principal place of business in Birmingham, Alabama; (and hereinafter called trustee) in trust with the powers and for the uses and purposes hereinafter set forth, to-wit:

(a.) My executors are to turn over, as soon as practicable, the trust property to the trustee, and the trustee shall preserve, manage, look after and control said trust property, collecting the rents, income and profits therefrom, with power in the trustee necessary or deemed necessary for these purposes and for the protection of said trust property, or any part thereof. * * *

(b.) The trustee is authorized and directed to pay from income all cost and expense incident to the protection and preservation of the trust estate, including taxes and insurance on the trust property, and including taxes, insurance and repairs on the property devised to my wife for life, and compensation to the trustee.

(c.) I direct the trustee to pay over from the net income from the trust estate the sum of Twenty-Five ($25.00) Dollars per month to Marion Wallace during the life of Marion Wallace.

All the rest and risidue of the net income from the trust estate, I direct the trustee to pay over as and when received share and share alike, to my wife, Martha Woodward, my son Allan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the survivors of them. * *

(d.) This trust is to continue during the life of the survivor of my three children, Allan H. Woodward,

Bertha W. Underwood, and Margaret W. Hopkins, and the trust is to terminate at the time of the death of the survivor of my three children.

47 (f.) It is my will and I direct the trustee on the termination of this trust under the provisions hereof, to divide the trust property, share and share alike between my grandchildren then living, the child or children or descendants of any deceased grandchild taking the share which the parent would have taken if living, provided, however, that in the event my wife, Martha Woodward should be living when the trust terminates under the provisions hereof, the trustee is to set aside from the trust property in its custody the sum of One Hundred Thousand ($100,000.00) Dollars to be held and used by the trustee to the extent necessary for the comfortable support, and maintenance of my wife during her life, and after her death, the balance of said trust fund of One Hundred Thousand ($100,000.00) Dollars, if any, shall be divided between my grandchildren on the same basis as set forth in this paragraph. * * *"

3. The property mentioned in item 7 (b) of the codicil was the property specifically devised by testator to his wife, for and during her life, by item 6 of the will and item 4 of the codicil, which property consisted of testator's homeplace in Birmingham, Alabama, together with the furniture, furnishings, pictures and fixtures therein, and his winter residence in Florida, together with all furniture and furnishings used in connection therewith. Item 4 of the codicil contained the following provisions.

"I direct the trustee hereinafter named to pay all taxes and assessments on the property devised and bequeathed to my wife, by Item Six (6) of my said will and by this item of this codicil, and to keep the

house and other buildings insured and in repair at the cost and expense of the trust estate, relieving my wife from this burden as provided in Item Six (6) of said will."

4. The executors paid the specific bequests made in the will, and thereafter in the year 1919 the residuary estate was delivered to the petitioner as trustee. The petitioner has acted as such trustee continuously since that time.

48 5. The testator left surviving him a widow, Martha B. Woodward, and three children, A. H. Woodward, Bertha W. Underwood, and Margaret W. Hopkins.

6. Martha B. Woodward did not dissent from the will; she died testate and a resident of Alabama, May 13, 1928 at the age of eighty-two years. The testator's three children, who were also her children, were all living at the time of her death.

7. The income from the trust property was collected by the petitioner each year from the time the trust property came into its custody up to and including May 13, 1928, and after paying (from the gross income) currently, the expenses directed to be paid by Item 7 of said codicil, the balance, the net income, was distributed currently as and when received throughout the period in question by paying over and delivering the same to the respective persons, including Mrs. Martha B. Woodward, the widow, in the respective amounts to which they were respectively entitled as required under the provisions of paragraph (c) of Item 7 of the codicil.

8. The amounts so paid by petitioner to Martha B. Woodward during her life aggregated $658,792.69,

of which $15,472.07 represented distributions of tax-free interest from United States and state bonds.

9. If the testator had died intestate, under the statutes of Alabama, Code of 1907, Sections 3763, 3812 and 3813, in the instant case, the widow would have been entitled to a child's part, or one-fourth
49 of the personal estate of her deceased husband, and would have been entitled, for life, to the use of one-third of his real property; but, as the testator died testate in the instant case, under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907, the widow, Martha B. Woodward, was entitled to dissent from the will of her deceased husband; and, in lieu of the provision made for her by his will, take her dower in the lands and such portion of the personal estate as she would have been entitled to in case of intestacy, provided she deposited a written dissent with the Judge of Probate of the County in which the will was probated within twelve months from the probate of the will, and a record entry was required to be made, specifying the date on which the dissent was made. The widow did not dissent from the will.

10. The net value of the personal property of the testator at the time of his death was $3,688,321.78. The net value of the real property of the testator at the time of his death was $385,771.49.

11. If, in the instant case, the widow, Martha B. Woodward had dissented from the will, she would have been entitled to a child's part, or one-fourth of the value of said personal estate, or $909,580.44, and would have been entitled to the use of one-third of the real estate for and during the term of her life, which dower right would have had a value of at least $30,000.00; that is, her interest in both real and personal property would have been at least $939,580.44.

12. The amount paid out by the petitioner for taxes, insurance and repairs on the real and personal property devised for life to Martha B. Woodward by Item 6 of the will and Item 4 of the codicil,
50 amounted during her life, in the aggregate, to $29,335.18, but this sum paid for these purposes by the trustee was paid from the gross income of the trust estate in accordance with the requirements of Item 7 (b) of the codicil, and not from the distributive share of Martha B. Woodward. The widow received no benefits under the will from the date of her husband's death to her own death other than as shown in these findings.

13. For the years 1919 to 1928, both inclusive, the petitioner, as trustee of this estate, filed fiduciary returns on Form 1041, with the Collector of Internal Revenue for the District of Alabama, and in computing therein taxable net income of the estate, deducted from gross income the amounts so distributed to Martha B. Woodward, as well as amounts similarly distributed to the other beneficiaries named under the testamentary trust described in paragraph (c) of Item 7 of the codicil.

14. Martha B. Woodward made and filed with the said Collector, an individual income tax return for each of the calendar years 1919 to 1927, both inclusive, and, in each such return, she included the amount that she had received from the petitioner under the trust during the taxable year for which the return was made, and paid income taxes thereon; but, subsequent to the decision of the United States Circuit Court of Appeals for the First Circuit in the case of United States v. Bolster, 26 Fed. (2d), 760, Martha B. Woodward having died as heretofore stated, her executor filed claims for refund of taxes paid by her on such
51 distributions received during each of the taxable years 1923 to 1927, both inclusive, ex-

cepting such part as was paid for the year 1923 as was barred from refund by the statute of limitations, and the Commissioner allowed these claims for refund, and refunded to the executor of Martha B. Woodward $65,092.96, with interest thereon, the refund being paid to said executor in January, 1930.

15. The executor of the estate of Martha B. Woodward made and filed with the same collector an individual income tax return for the period from January 1, to May 13, 1928, both inclusive, and in such returns the said executor did not include the amount distributed by petitioner during the period in question.

16. The deficiencies asserted by the respondent in these proceedings result solely from his action in disallowing the deductions so claimed of amounts distributed from sources other than tax-free interest to Martha B. Woodward, as described in Finding No. 8.

17. The executor of the estate of Martha B. Woodward entered into an agreement with petitioner on June 29, 1929, that the said executor will pay the expense of contesting the deficiencies asserted herein, and that in the event such deficiencies are upheld by a decision of the Board which has become final, said executor will reimburse petitioner for any amounts paid as a result of such decision.

18. The Commissioner of Internal Revenue has allowed the deductions which were made by the petitioner upon its fiduciary returns on Form 1041 for the years 1919 to 1928, both inclusive, in so far as all distributions made to the other beneficiaries, namely,

A. H. Woodward, Bertha W. Underwood,
52 Martha W. Hopkins and Marion K. Wallace,
(who was entitled to and was paid $300.00

each year pursuant to said will and codicil) are concerned, but the Commissioner disallows the deduction of all amounts distributed by the petitioner to Martha B. Woodward during her life except distributions of tax-free interest as set out in Finding No. 8.

Both parties to this proceeding agree that the case is controlled by our decision in Julia Butterworth, et al., Trustee Under the Will of William B. Butterworth, Deceased, 23 B. T. A. 838. Under the authority of that decision we hold that the amounts paid to the widow were paid to her in satisfaction of or as compensation for, her dower rights and are not distributions of income within the meaning of the statute and hence are not deductible in computing the net income of the trustee.

Judgment will be entered for the respondent.

Entered: Feb. 12, 1932.

Title Guarantee Loan & Trust Company, Trustee of the Estate of J. H. Woodward, Petitioner,

v. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

DECISION.

53 United States Board of Tax Appeals Washington.

Pursuant to the determination of the Board, as set forth in its report promulgated memorandum opinion entered February 12, 1932, it is ordered and decided: That there are deficiencies as follows:

Year	Amount
1924	$24,462.71
1925	$ 6,094.92
1926	$ 6,644.72
1927	$ 7,131.76

Enter: Entered Feb. 13, 1932.
(Signed) CHARLES M. TRAMMELL,
(Seal) Member.

Title Guarantee Loan & Trust Company, Trustee of the Estate of J. H. Woodward, Petitioner,

v. Docket No. 51185.

Commissioner of Internal Revenue, Respondent.

DECISION.

54 United States Board of Tax Appeals, Washington.

Pursuant to the determination of the Board, as set forth in its report promulgated memorandum opinion entered February 12, 1932, it is ordered and decided: That there is a deficiency of $1,130.84 for the year 1928.

Enter: Entered Feb. 13, 1932.
(Signed) CHARLES M. TRAMMELL,
(Seal) Member.

Title Guarantee Loan and Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

v. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

PETITION FOR REVIEW.

55 United States Board of Tax Appeals.

Filed Mar. 1, 1932.

Now comes the petitioner, Title Guarantee Loan and Trust Company, as Trustee of the Estate of J. H. Woodward, by its attorneys, E. J. Smyer, Oscar W. Underwood, Jr., and H. C. Kilpatrick, and respectfully shows unto the Court the following:

I.

The petitioner is a corporation organized and existing under the laws of the State of Alabama, with principal office at Birmingham, Alabama, and is trustee under the will of J. H. Woodward, deceased, who died testate on December 15, 1917, while a resident of Alabama. For the taxable years involved in this proceeding, namely, the calendar years 1924 to
56 1927, inclusive, petitioner filed its returns as such trustee for the purpose of the federal income tax with the Collector of Internal Revenue for the District of Alabama, and the office of said Collector of Internal Revenue is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

II.

The nature of the controversy, so far as here pertinent, is as follows:

Under his will and a codicil thereto, both of which were duly admitted to probate in the Probate Court of Jefferson County, Alabama, J. H. Woodward (hereinafter called the testator) devised his residuary estate to petitioner, as trustee, to be held in trust by peti-

tioner during the life of the survivor of testator's three children, and upon the death of such survivor the corpus to be distributed among the testator's grandchildren then living or their descendants. The trust estate has not been terminated, but is still in existence.

The codicil provided for the payment from income of all cost and expense incident to the protection and preservation of the trust estate, and of taxes, insurance and repairs upon property specifically devised
57 to testator's wife for life; provided for the payment from net income of $25 per month to one Marion Wallace during her life; and provided that all the rest and residue of the net income from the trust estate, as and when received, should be paid over to testator's wife and the other beneficiaries designated in the will, the said wife to receive one-fourth of such net income during her life and the duration of the trust.

The testator's widow did not dissent from the will, as she had a right to do, under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907. The trust property was delivered to petitioner, as trustee, in the year 1919, and petitioner has acted as such trustee since that time. From that time to and including December 31, 1927, petitioner collected the income from the trust property and, after paying from gross income currently the costs and expenses specified by the codicil, it distributed the balance, the net income, currently, as and when received, by paying it over to the beneficiaries as directed by the codicil. The amounts so paid over to the widow to and including December 31, 1927, aggregated $624,940.69,
58 of which $348,492.49 was paid over during the taxable years here involved, as follows:

Year	Total Paid	From Tax-free Bond Interest	Balance
1924	122,816.11	2,925.00	119,891.11
1925	73,392.01	2,925.00	70,467.01
1926	76,328.43	2,925.00	73,403.43
1927	75,955.94	2,925.00	73,030.94
Totals	348,492.49	11,700.00	336,792.49

During the years 1919 to 1927, inclusive, petitioner expended for taxes, insurance and repairs on the property specifically devised to the widow $27,643.89, which amount was paid from gross income of the trust and not from the widow's distributive share of the net income. The widow received no other benefits from the trust through 1927 other than as shown herein.

The value of the widow's dower and statutory interest in the testator's property, had she dissented from the will, would have been at least $939,580.44.

For the years 1919 to 1927, both inclusive, the petitioner, as trustee of this estate, filed fiduciary returns on Form 1041 with the said Collector, and, in computing therein taxable net income of the estate, deducted from gross income the amounts distributed to the trust beneficiaries named in the will, including the amounts above specified as amounts paid to the widow.

For the taxable years here involved, the respondent has disallowed the deduction of amounts so
59 distributed to the widow from sources other than tax-free interest, and as a result of such disallowance determined deficiencies in income taxes for the years 1924 to 1927, inclusive, as follows:

1924	$24,462.71
1925	6,094.92
1926	6,644.72
1927	7,131.76

The Board of Tax Appeals, by its decision herein, approved respondent's action. The hearing before the Board was held January 20, 1942. The findings of fact and opinion of the Board were entered February 12, 1942, and its final order, fixing the deficiencies at the amounts determined by the respondent, was entered February 13, 1942.

III.

Petitioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

Wherefore, it petitions that a transcript of record be prepared in accordance with the rules of the said United States Circuit Court of Appeals for the Fifth Circuit and transmitted to the Clerk of said Court for filing and appropriate action to the end that the error hereinafter set forth may be reviewed and corrected by the said Court.

(9) IV.

The petitioner's assignment of error is as follows:

The Board erred in holding that, in computing the net income of the trust established by the will and codicil thereto of J. H. Woodward, for each of the calendar years 1924 to 1927, inclusive, petitioner, as trustee, was not entitled to deduct the amount of the income of the trust, for each and all of its said taxable years, which was distributable currently and which was distributed currently by petitioner, as such trustee, to the widow of said J. H. Woodward, who was one of the beneficiaries of said trust.

Wherefore, your petitioner prays that the Circuit Court of Appeals for the Fifth Circuit review the action and decision of the Board of Tax Appeals in this case and reverse the decision; and that your petitioner have all such other and further relief as it is entitled to and as to the Court may seem just and proper.

E. J. SMYER,
Title Bldg.,
Birmingham, Alabama.

OSCAR W. UNDERWOOD, JR.,
717 Southern Building,
Washington, D. C.

R. C. KILPATRICK,
717 Southern Bldg.,
Washington, D. C.,
Attorneys for petitioner.

61 District of Columbia, ss.

Oscar W. Underwood, Jr., being duly sworn, says that he is one of the attorneys for the petitioner in the above entitled cause; that he has read the foregoing petition and assignment of error and is familiar with the statements therein contained; that the facts set forth in said petition are true, as he is informed and believes; and that this petition is not filed for the purpose of delay, but in good faith and in truth for the causes therein set forth.

OSCAR W. UNDERWOOD, JR.

Subscribed and sworn to before me this the 29th day of February, 1932.

GERTRUDE ELLIS,
Notary Public.

62 Filed Mar. 1, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

vs. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Please take notice that we have today lodged with the United States Board of Tax Appeals on behalf of the above named petitioner a petition seeking a review of the Board's decision herein by the Circuit Court of Appeals for the Fifth Circuit, a copy of which petition is hereto attached and served upon you.

(Signed) OSCAR W. UNDERWOOD, JR.,
(Signed) H. C. KILPATRICK,
Attorneys for Petitioner.

Receipt of the above and foregoing notice, together with a copy of the petition mentioned therein, is hereby acknowledged this 1st day of March, 1932.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

63 PETITION FOR REVIEW.

Filed Mar. 1, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs. Docket No. 51,185.
Commissioner of Internal Revenue, Respondent.

Now comes the petitioner, Title Guarantee Loan and Trust Company, as Trustee of the Estate of J. H. Woodward, by its attorneys, E. J. Smyer, Oscar W. Underwood, Jr., and H. C. Kilpatrick, and respectfully shows unto the Court the following:

I.

The petitioner is a corporation organized and existing under the laws of the State of Alabama, with principal office at Birmingham, Alabama, and is trustee under the will of J. H. Woodward, deceased, who died testate on December 15, 1917, while a resident of Alabama. For the taxable year involved in this proceeding, namely, the calendar year 1928, petitioner filed a return as such trustee for the purpose of the federal income tax with the Collector of Internal Revenue for the District of Alabama, and
64 the office of said Collector of Internal Revenue is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

II.

The nature of the controversy, so far as here pertinent, is as follows:

Under his will and a codicil thereto, both of which were duly admitted to probate in the Probate Court of

Jefferson County, Alabama, J. H. Woodward (hereinafter called the testator) devised his residuary estate to petitioner, as trustee, to be held in trust by petitioner during the life of the survivor of testator's three children, and upon the death of such survivor the corpus to be distributed among the testator's grandchildren then living or their descendants. The trust estate has not been terminated, but is still in existence.

The codicil provided for the payment from income of all cost and expense incident to the protection and preservation of the trust estate, and of taxes, insurance and repairs upon property specifically devised to testator's wife for life; provided for the payment from net income of $25 per month to one Marion Wallace during her life; and provided that all the rest
65 and residue of the net income from the trust estate, as and when received, should be paid over to testator's wife and the other beneficiaries designated in the will, the said wife to receive one-fourth of such net income during her life and the duration of the trust.

The testator's widow did not dissent from the will, as she had a right to do, under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907. The trust property was delivered to petitioner, as trustee, in the year 1919, and petitioner has acted as such trustee since that time. From that time to and including May 13, 1928, on which date the widow died, petitioner collected the income from the trust property and, after paying from gross income currently the costs and expenses specified by the codicil, it distributed the balance, the net income, currently, as and when received, by paying it over to the beneficiaries, as directed by the codicil. The amounts so paid over to the widow to and including May 13, 1928, aggregated $658,792.69, of which $33,852.00 was paid over during the taxable year here involved.

During the life of the widow, petitioner expended for taxes, insurance and repairs on the property speci-

fically devised to her $29,335.18, which
66 amount was paid from gross income of the trust and not from the widow's distributive share of the net income. The widow received no other benefits from the trust during her life.

The value of the widow's dower and statutory interest in the testator's property, had she dissented from the will, would have been at least $939,580.44.

For the years 1919 to 1928, both inclusive, the petitioner, as trustee of this estate, filed fiduciary returns on Form 1041, with the said Collector, and, in computing therein taxable net income of the estate, deducted from gross income the amounts distributed to the trust beneficiaries named in the will, including the amounts above specified as amounts paid to the widow.

For the taxable year 1928, the respondent has disallowed the deduction of amounts so distributed to the widow, and as a result of such disallowance determined a deficiency in income taxes of $1,130.84. The Board of Tax Appeals, by its decision herein, approved respondent's action.

The hearing before the Board was held January 20, 1932. The findings of fact and opinion of the Board were entered February 12, 1932, and its final order,
fixing the deficiency at the amount deter-
67 mined by the respondent, was entered February 13, 1932.

III.

Petitioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

Wherefore, it petitions that a transcript of record be prepared in accordance with the rules of the said

United States Circuit Court of Appeals for the Fifth Circuit and transmitted to the Clerk of said Court for filing and appropriate action to the end that the error hereinafter set forth may be reviewed and corrected by the said Court.

IV.

The petitioner's assignment of error is as follows:

The Board erred in holding that, in computing the net income of the trust established by the will and codicil thereto of J. H. Woodward, for the calendar year 1928, petitioner, as trustee, was not entitled to deduct the amount of the income of the trust for such taxable year which was distributable currently and which was distributed currently by petitioner, as such trustee, to the widow of said J. H. Woodward, who was one of the beneficiaries of said trust.

Wherefore, your petitioner prays that the Circuit Court of Appeals for the Fifth Circuit review the action and decision of the Board of Tax
68 Appeals in this case and reverse that decision; and that your petitioner have all such other and further relief as it is entitled to and as to the Court may seem just and proper.

E. J. SMYER,
Title Building,
Birmingham, Alabama.
OSCAR W. UNDERWOOD, JR.,
717 Southern Building,
Washington, D. C.,
H. C. KILPATRICK,
717 Southern Building,
Washington, D. C.,
Attorneys for Petitioner.

District of Columbia, ss.

Oscar W. Underwood, Jr., being duly sworn, says that he is one of the attorneys for the petitioner in the above entitled cause; that he has read the foregoing petition and assignment of error and is familiar with the statements therein contained; that the facts set forth in said petition are true, as he is informed and believes; and that this petition is not filed
69-a for the purpose of delay, but in good faith and in truth for the causes therein set forth.

OSCAR W. UNDERWOOD, JR.

Subscribed and sworn to before me this the 29th day of February, 1932.

GERTRUDE ELLIS,
Notary Public.

69-b Filed Mar. 1, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

vs. Docket No. 51185.

Commissioner of Internal Revenue, Respondent.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Please take notice that we have today lodged with the United States Board of Tax Appeals on behalf of the above named petitioner a petition seeking a review

of the Board's decision herein by the Circuit Court of Appeals for the Fifth Circuit, a copy of which petition is hereto attached and served upon you.

(Signed) OSCAR W. UNDERWOOD, JR.,
(Signed) H. C. KILPATRICK,
Attorneys for Petitioner.

Receipt of the above and foregoing notice, together with a copy of the petition mentioned therein, is hereby acknowledged this 1st day of March, 1932.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

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70 STIPULATION TO CONSOLIDATE RECORD.

Filed Mar. 10, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 43,615, Docket No. 51,185.

The parties to the above entitled proceedings, by their respective attorneys, do hereby stipulate and agree that, in view of the fact that these proceedings involve the same question of law and were consolidated for hearing before the Board, and in view of the fact that the findings of fact and opinion promulgated by the Board cover both proceedings, the Clerk of the

Board of Tax Appeals, in preparing and certifying to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit the documents required by the rules of that Court, may prepare a joint transcript of such documents, including only one copy of opinion.

It is further agreed and stipulated that the transcript of record in the Circuit Court of Appeals may be printed as one document.

OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
Attorneys for Petitioner,

Dated March 10, 1932.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

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71 PRAECIPE.

Filed Mar. 10, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 43,615, Docket No. 51,185.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and certify to the Clerk of the United States Circuit Court of Appeals for the

Fifth Circuit, within the time allowed by the rules of that Court in this respect, a joint transcript of record in the above entitled proceedings, consisting of the following documents:

1. The docket entries of the proceedings before the Board in each case.

2. Pleadings before the Board in each case.

3. Opinion and decision of the Board.

4. Petition for review and notice of filing in each case.

5. Stipulation for consolidation of the record.

6. This praecipe.

OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
Attorneys for Petitioner.

72 CERTIFICATE.

Title Guarantee Loan & Trust Co., as Trustee of the Estate of J. H. Woodward, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 43615 & 51185.

I, B. D. GAMBLE, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 71, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 30th day of March, A. D. 1932.

(Seal) B. D. GAMBLE, Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

(Extract from the minutes of January 31, 1933)

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward,

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called and after argument by E. J. Smyer, Esq., for petitioner, and John MacC. Hudson, Esq., special assistant to the Attorney General, for respondent, was submitted to the court.

Opinion of the court

Filed February 17, 1933

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward, petitioner

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Alabama)

(February 17, 1933)

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges

SIBLEY, *Circuit Judge.* The question here is whether in returns for income taxes a testamentary trustee may have a deduction of amounts paid from income to a widow of the testator who takes a share in the trust estate in lieu of dower. The Board of Tax Appeals following its decision in re Butterworth, 23 B.T.A. 838, denied the deduction and the trustee seeks a review.

The years involved are 1924, 1925, 1926, 1927, and a part of 1928. The several applicable revenue acts have this identical provision as to trust estates:

"There shall be allowed as an additional deduction in computing net income of the estate or trust, the amount of the income of the

estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

The general purpose apparent is to make the income which is distributed or distributable to the beneficiaries of the trust taxable to them rather than to the fiduciary, thus relieving him and charging them. In the present case the trust was created by will in the residual estate of J. H. Woodward, of Alabama, which the executors were to deliver to the trustee upon trusts that so far as here important are:

"I direct the trustee to pay over from the net income of the trust estate the sum of $25.00 per month to Marian Wallace during the life of Marian Wallace. All the rest and residue of the net income from the trust estate I direct the trustee to pay over as and when received, share and share alike, to my wife Martha Woodward, my son Allen H. Woodward, my daughter Bertha W. Underwood, and my daughter Margaret W. Hopkins, or the survivors of them."

By Alabama Code of 1923, §§ 10503 and 10504, the widow may dissent from the provisions made for her in her husband's will, and take her dower in his lands and a child's part in his personalty; but not dissenting by a writing duly filed in the Probate Court within twelve months after probate, she assents. Mrs. Woodward thus assented, and was paid her share in the net income of the trust estate until her death in May 1928. Prior to 1928 the trustee took deductions for what he paid her, and she paid income taxes on it, but after the decision in United States vs. Bolster, 26 Fed. (2d) 760, she was refunded the taxes she had paid and the deficiencies now charged to the trustee were assessed.

We think Mrs. Woodward is a beneficiary in the trust, receiving the net income therefrom as income, the tax on which is chargeable to her and not to the trustee. The term beneficiary is broadly used in the statute as a correlative to fiduciary and includes those who are the usees in the trust. What was paid Mrs. Woodward was paid her not in discharge of any monetary obligation due by the trust but as her share along with her children in its profits. We agree with the multitude of authorities cited in re Butterworth, 23 B.T.A. 838; United States vs. Fed. (2d) 760; and Allen vs. Brandeis, 29 Fed. (2d) 363, that at the death of her husband this widow had a legal estate in dower in his lands and an undivided one fourth legal interest in his personalty, and the will in effect made an offer to purchase these from her in consideration of what it gave her; and that in electing to take under the will she took as a purchaser for value and not as a volunteer. But we think the Bolster case and that of Butterworth based on it did not sufficiently consider what the widows there involved got—not a money obligation but an estate in an investment.

Had Mrs. Woodward retained her dower in the realty and her fourth interest in her husband's securities, she would have owed taxes on the income she received from them. She exchanged those legal estates for an equitable estate in substantially the same property, but managed for her by a trustee, which she thought preferable. She has changed the form of her investment but the income from it is still income and paid to her as such by the very words of the will to which she assented. She has no charge on or debt against the trust estate. For the sale of her legal rights in her husband's estate she was paid in full by the equitable estate received under the will. Thereafter she was no creditor but the owner of that interest in property, exactly like the interest of each of her children except that she paid for hers and theirs presumably was given to them. The case is otherwise when the widow sells her rights for money, whether paid in a lump sum, or in instalments, or as an annuity. She is in such cases a creditor realizing on the conversion of her property into cash and entitled in general to receive her capital before what she gets becomes gain, and especially so when the getting of it is too uncertain to assign a present value to the obligation which she holds. Burnett vs. Logan, 283 U.S. 404. In Warner vs. Walsh, 15 Fed. (2d) 367, the widow sold her rights for an annuity. The same was true in Allen vs. Brandeis, 29 Fed. (2d) 263. But in the case at bar there was no sale for a money measured price, but an exchange of legal estates for an equitable estate in an investment. What comes from it as income is income to Mrs. Woodward and not capital, just as it is income and not bequest to her children. Irwin vs. Gavitt, 268 U.S. 161; Heiner vs. Beatty, 17 Fed. (2d) 743, affirmed 276 U.S. 598. The petition for review is granted, and the Board of Tax Appeals is directed to allow the deduction accordingly.

Reversed and remanded.

Judgment

Extract from the minutes of February 17, 1933.

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Title Guarantee Loan & Trust Company, as trustee of the estate of J. H. Woodward, for review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decision of the said United States

Board of Tax Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said Board of Tax Appeals for further proceedings in accordance with the opinion of this court.

In the United States Circuit Court of Appeals for the Fifth Circuit

Order recalling and staying mandate

Extract from the minutes of March 27th, 1933

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward

versus

COMMISSIONER OF INTERNAL REVENUE

For cause shown it is ordered that the mandate of this court, issued to the clerk of the United States Board of Tax Appeals, at Washington, D.C., on the 17th day of March, A.D. 1933, be, and the same is hereby, recalled, and stayed for the period of thirty days from this date; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

Clerk's certificate

UNITED STATES OF AMERICA

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, clerk of the United States Circuit court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 66 to 73 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 6586, wherein Title Guarantee Loan & Trust Company, as trustee of the estate of J. H. Woodward, is petitioner, and Commissioner of Internal Revenue, is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 65 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said circuit court of appeals, at my office in the city of New Orleans, Louisiana, in the fifth circuit, this 25th day of April, A.D. 1933.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals,
Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933